United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-1025

United States Court of Appeals

For the Second Circuit

76-1025

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH ANTHONY PELOSE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

I. Introduction

We submit this brief reply to the Government's arguments in the hope that it will further narrow the issues and will facilitate oral argument. We deal first with the issue whether the court's charge correctly stated the law and then with the issue whether Pelose was prejudiced by the last-minute change in the theory of the Government's case.

II. The Error in the Charge

The Government places its chief reliance upon three cases: *Capone* v. *United States*, 51 F.2d 609 (7th Cir.), *cert. denied*, 284 U.S. 669 (1931); *United States* v. *Andros*, 484

F.2d 531 (9th Cir. 1974); and *Arnold* v. *United States*, 75 F.2d 144 (9th Cir. 1935). The first two cases are surely not in point; the third does not say what the Government says it does.

In both *Capone* and *Andros*, the question was whether the crime of wilfully failing to *pay* a tax could be committed on a date other than that on which the return had to be filed. In each, the Court of Appeals quite properly answered in the affirmative, since it is quite obvious that the duty *to pay*, as distinguished from the duty *to file*, can be fulfilled in installments—a fact well-known to numerous taxpayers who, not having in pocket their tax liability on the due date, make arrangements with the Government, pursuant to Internal Revenue Service regulations,[1] to pay their taxes over a period of time. Indeed, the court in *Capone* specifically justified its holding on that ground when, after reviewing various statutes and regulations, it stated that "it therefore seems to be clear that there are different times when income taxes are due and payable" 51 F.2d at 618. And *Andros* relied largely upon *Capone*. Each of the two cases, therefore, is clearly distinguishable.

In *Arnold*, the trial court charged the jury in a fashion similar to the charge in this case. Thus, the case deserves some detailed attention here. A failure to file a return due March 15, 1931 was charged in one count of an indictment handed down on March 30, 1934—two weeks after the normal three-year statute of limitations had ostensibly run. The trial court charged the jury that the duty to file

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[1] We submit that it is most significant that there does not exist, in those myriad regulations, a single one stating that the duty to file a return is a continuing one. This is in sharp contrast to the existence of a continuing duty to register for the draft, as set forth in the Selective Service System regulations involved in *Toussie v. United States*, 397 U.S. 112 (1970).

was a continuing one and that the defendant could be convicted if the jury found that his wilfulness in failing to file had occurred at any time within three years of the filing of the indictment, i.e., if the defendant had, at any time after March 30, 1931, wilfully failed to comply with his continuing duty to file. The conviction was affirmed.

For a number of reasons, the Government has misplaced its heavy reliance on *Arnold*. First, if it holds what the Government hopes and says it does, it has been overruled *sub silentio* by *Toussie*, which condemns such reasoning. Second, although the statute of limitations problem was apparent on the face of the indictment, it was never raised by the defendant at any time before the case was submitted to the jury.[2] Third, the defendant took no exception to the charge about which he complained on appeal. Fourth, the Ninth Circuit noted that the trial court's charge was substantially similar to the one requested by the defendant. 75 F.2d at 145. Finally, the trial court had charged that the "continuing" duty to file continued only for the balance of the year in which the return was due, i.e., until December 31, 1931. If that charge is correct, then the one given below is surely not, for it contained no such limitation. All in all, *Arnold* is hardly an authority out of which a prosecutor's appellate dreams are made.

The Government also mistakenly relies upon the various civil penalties which, by statute or regulation, may be imposed upon one who, without reasonable cause, fails to file a timely return. Those penalties, based upon a percentage of the tax due, increase from month to month and thus, says the Government, prove the continuing duty to file. There are two short answers to this. First, the exist-

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[2] Unless raised in a timely fashion, any defect in an indictment based upon the statute of limitations is waived. See, e.g., *Askins* v. *United States*, 251 F.2d 909 (D.C. Cir. 1958).

ence of civil penalties for a delay in filing cannot possibly prove that there is a continuing duty to file which, if violated, will subject the offender to *criminal* penalties. Second, the statute upon which the Government relies, 26 U.S.C. § 6651, provides for increased penalties for only five months. Accepting the Government's logic, this would mean that the duty to file continues for only five months—a theory which would render the charge below erroneous for yet another reason.

The Government also provides the hard case which, it hopes, will cause this Court to respond with bad law. It posits, at page 11, a case where a corporate president, under severe stress, genuinely forgets to file the corporate return on March 15. A day later, his attention is called to this oversight, but he then deliberately decides not to file a return. The Government claims that our position necessarily is that that person is not guilty of a violation of 26 U.S.C. § 7203. That is precisely our position—a position made necessary by: (1) the words of the statute; (2) the law's general antipathy to "continuing" crimes; (3) the fact that Congress could have made the offense in question a continuing one, but never did so; and (4) the Internal Revenue Service, by regulation, could have made the offense a continuing one, but chose not to do so.

That the law, as written, may cause results the Government regrets is no justification for its asking this Court to do what neither Congress nor the Service has done. Let it take its misgivings to Congress or to the Service and seek remedial legislation or regulations. There, not here, is its proper forum.

We have hard cases of our own. Suppose, for example, that a taxpayer files a return which he sincerely believes to be true but which contains an honest mistake (arithme-

tical or otherwise) reducing the tax he owes by $5,000. When he files the return, since his error is an honest one unknown to him, he surely commits no crime. Suppose, however, that a year or so later his attention is called to the error and he decides to do nothing about it. Has he committed a crime at that later date? If so, what crime? The filing of a false return (nunc pro tunc)? The failure to file an amended return? Is his deliberate inaction a "continuing" crime? We submit that in such a case no crime has been committed, for there must be a combination of forbidden act and improper intent *at the same time* in order for there to be a punishable offense. See, e.g., *Terry* v. *United States*, 131 F.2d 40 (8th Cir. 1947) Perhaps there should be a statute to cover such conduct, but the creation of such a statute is a legislative rather than a judicial function.

III. The Prejudice to Pelose

A major portion of the Government's brief is devoted to the proposition (no doubt advanced tongue-in-cheek) that it was the Government's position at trial that Pelose could be guilty on the basis of a wilfulness formed years after the due date, and that that position was obvious to Pelose and his counsel. Nothing could be further from the truth.

If the Government's theory of Pelose's guilt contained the concept espoused by the court's charge, the prosecutor should be commended for his uncanny ability to keep that theory a secret. It was nowhere specified in the information drawn by him. It was never mentioned during his numerous colloquies with the court during trial. There was not a hint of it in the Government's requests to charge.

Nothing was said about it on summation.[3] We are at a loss, therefore, to understand such strange silence on the issue.

The claim that counsel for Pelose was not surprised by the charge is based upon a misreading of the record and a misunderstanding of the nature of the defense. The Government misreads the record when it states, at pages 19-20, that the court alerted counsel to what it would later charge by a colloquy with him in mid-trial. That colloquy did no such thing, and to read it as so doing merely constitutes wishful thinking.[4] The Government also misreads the court's preview to counsel of what it intended to charge, that preview having occurred at the close of the evidence. The quotation from that preview, at pages 22-23, may reasonably be read as saying no more than that a condition causing a lack of wilfulness as to earlier counts may disappear and not provide a defense for later counts. In any event, one who learns only after all the evidence is in that the trial court plans to give a novel charge is surely entitled to claim surprise.[5] And counsel's response to that "preview," quoted on page 23, surely is no "adoption" of a theory to which he shortly thereafter took exception.

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[3] Indeed, when summing up, the prosecutor asked the jury (T590): "Does that tell you something about the workings of Mr. Pelose's mind, about whether or not Mr. Pelose intended *during the years charged in the information*, whether or not he intended to give the information to the Government that the law demands?" (Emphasis added).

[4] Indeed, when the trial court asked counsel what excuse Pelose had for his failure to file in 1972, 1973 and 1974, counsel responded that those years were not before the jury. Even his later concession that the conduct posited by the court came "awfully close" to "wilful negligence" may be read as referring to a future failure to file returns for future years. See T400-01.

[5] The novelty of the charge is emphasized by the fact that the closest one to it was delivered in *Arnold* more than forty years before.

The Government also misunderstands the nature of the defense. Pelose was not showing his illness in 1972 through 1975 in order to negate wilfulness in those years (since he was not charged with failure to file in those years) but only to show the severity of the illness which had precluded wilfulness in earlier years. The proof that Pelose was taken by surprise to his prejudice lies in the fact that counsel, on summation, said virtually nothing in response to the unmade argument that the crimes involved could have been committed long after the due date of the returns.

IV. Conclusion

We respectfully submit that the court's erroneous charge severely prejudiced Pelose not only because of its content but because of the timing of its deliverance. On those grounds, the judgment of conviction should be reversed.

Respectfully submitted,

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